Commissioner Phil Jones Response to Questions for the Record from the April 25 Hearing: "The Lifeline Fund: Money Well Spent?"

I. The Honorable Henry Waxman

[A] Mr. Gregg's Testimony cited data claiming that eight States have more Lifeline subscribers than low income households – Alaska, Arkansas, Georgia, Louisiana, Maryland, Ohio, Oklahoma, and Rhode Island. After our hearing, one analysis questioned this conclusion, arguing the Mr. Gregg's conclusions were based on outdated poverty statistics and an undercount of eligible recipients, among other issues. Do you agree? Can NARUC provide the Committee with data from those eight States to help us determine whether the Lifeline programs in those States are in fact oversubscribed?

Answer: Mr. Gregg's calculations, if true, reinforce the imperative to get the national duplication and eligibility verification databases up and running quickly. However, there are some aspects of his analysis that invite criticism.

For example, it appears the low-income household numbers were taken from 2010 census data collected in 2009. Yet that somewhat dated information was compared with Lifeline subscribership data from 2012 and 2013. Obviously, comparing data from different time spans is unlikely to produce reliable conclusions. It is quite possible that his analysis understates the number of eligible low-income households in 2012-13.

Moreover, using the 135% of the federal poverty guideline (FPG) as the proxy for lifeline eligibility is inappropriate. This "proxy" does not account for permissible variations in Lifeline eligibility standards. The federal Lifeline eligibility criteria is a floor and States are allowed to, and often do, set different eligibility criteria – typically participation in other "qualifying" State low income assistance programs. For example, Ohio defines poverty as 150% of FPG. Ohio's state heating assistance program is set at 200% of FPG. A participant in either program qualifies for Lifeline service – but obviously would appear as ineligible in an analysis based just on the FPG. In Rhode Island, the income level to participate in the State low income heating assistance program, which also qualifies recipients for Lifeline, is based on 60% median income which for FY2012-2013 is $52,601 for a family of four compared to the FPG's $37,680 for the same family. These are only two examples of State specific differences that are necessarily excluded from an analysis based-only on the FPG and can only result in under-reporting of the number of eligible participants.

Mr. Gregg's dated calculations also appear to be based on Lifeline subscribership data collected prior to the first FCC-required Lifeline recertification. It does not appear Mr. Gregg's calculations account for the recent FCC announcement that the 2012 recertification resulted in 29% of Lifeline subscribers being de-enrolled (DA 13-872). Obviously, *even if Mr. Gregg's analysis contains <u>no</u> other methodological errors*, it overstates the current alleged disparity between households that have the service and those that are actually eligible for the subsidy.

Some of NARUC's member commissions question the methodology used by Mr. Gregg to calculate the Adjustment for Tribal Support. All of Alaska is considered Tribal Lands and therefore all Lifeline-eligible customers in that state are entitled to receive a Lifeline credit of up to $34.25 per month (the regular Lifeline credit of $9.25 + the $25 tribal Lifeline credit). Indeed, Mr. Gregg concedes this problem in his testimony – noting that: "[t]wo of these states – Alaska and Oklahoma – contain 88% of total tribal Lifeline subscribers, so it is possible that additional tribal support is responsible for the high level of actual support in those states."

The Universal Service Administrative Company (USAC), the independent third party administrator of the USF program, provides an annual map showing Lifeline participation rates by State. The most recent data the USF administrator has released is for 2011.[1] The published report only provides participation rates within ranges (below 10%; 10 to 20%; 20 to 50%; and above 50%). At least two States (Ohio and Rhode Island) Mr. Gregg cites as being oversubscribed were listed by USAC as having a 2011 participation rate of between 20% and 50%. The others were listed as having participation rates above 50%. The FCC could require a more detailed analysis of program participation by USAC in the future to better gauge if "oversubscription" is actually a problem in those states.

It is worth repeating, the best thing Congress can do now to increase efficiency and eliminate fraud, is to assure the FCC brings online the national duplication and eligibility verification databases as quickly as possible.

[B] Mr. Feiss stated in his written testimony for the hearing that "no application for Lifeline-only ETC designation has been denied anywhere in the U.S." Mr. Jones, your testimony stated that at least six States had denied an ETC denied an ETC application. How can we reconcile these two statements?

Answer: As stated in my testimony, not many ETC applications are denied because the provider almost always withdraws their application before that can occur. In my State of Washington, for example, our staff recommended that we deny some ETC designations (Two examples: Reconnex [wireline Lifeline ETC applicant] and Midwestern Telecommunications, Inc. [prepaid wireless Lifeline ETC applicant]). Each time the carrier withdrew their application after the staff issued its negative recommendation but before it came up for a vote.

Often, PUCs and their staff will work with providers and seek revisions until the application is deemed acceptable. For example, the Wisconsin proceeding on TracFone's designation took two years and several revisions before it was finally approved. In a few other cases, including one in South Dakota, a State Commission denied a wireless petition for ETC

1 Universal Service Administrative Co., 2011 Lifeline Participation Rate by State Map, available online at: http://www.usac.org/_res/documents/li/pdf/participation-rates/li-participation-rate-map-2011.pdf.

designation but was overturned on appeal. In our informal survey of member PUCs, we did not specifically ask respondents if ETC applications they had denied were for Lifeline only. It is a fact that some wireless Lifeline only applications have been denied at the State level. Below you will find links to a couple State commission orders denying wireless applications for Lifeline only ETC status. This is by no means a comprehensive list but indicates that indeed some have been denied.

California: *Resolution to Deny the Request of TracFone Wireless, Inc. (U-4231-C) to be Designated an Eligible Telecommunications Carrier in California*. Resolution No.T-17235, December 17, 2009.

Link: http://docs.cpuc.ca.gov/PublishedDocs/PUBLISHED/FINAL_RESOLUTION/111397.htm

Indiana: *IURC Order Denying True Wireless Petition for Designation as an ETC for Lifeline Purposes Only* (41052 ETC 64), February 20, 2013.

Link: http://www.in.gov/iurc/files/41052_64order_022013.pdf

> *[C] There was some discussion at the hearing about an "explosion" of ETC designations for Lifeline. From your perspective in the States, what percentage of the carriers certified to participate in Lifeline are also receiving high-cost support? How many are only certified to participate in Lifeline?*

Answer: Without a doubt there has been an increase in the number of wireless Lifeline-only ETCs across the country. We were unable to locate any public national statistics distinguishing Lifeline-only and high-cost ETCs. The universal service program administrator – USAC – should have this data and be able to provide a national analysis of the growth in Lifeline-only ETCs. They would be the most likely source for the most comprehensive and accurate national data.

However, I can share with you information on my State and a few others that had this information readily available.

In Washington State, for years we had twenty-four wireline and seven facilities-based wireless ETCs that received both high-cost and Lifeline support. The number of wireless ETCs that receive both is now down to five. In the past, we had as many as four wireline Lifeline-only ETCs but only one of those remains. The biggest change has been the increase in the number of Lifeline-only wireless ETCs which all filed for designation *after* 2009. Currently Washington has six wireless Lifeline-only ETCs. Another ten applications are pending.

In 1997, California had eighteen ETCs participating in both high-cost and Lifeline programs. Currently the State has granted fourteen Lifeline-only ETCs, all wireless: four in 1998; one in 2006; one in 2008; one in 2009; two in 2010; and five in 2011. Currently, thirteen additional Lifeline-only ETC applications are pending. Of those, two are wireline providers and eleven are wireless.

Massachusetts has a total of ten ETCs. Five are wireline carriers that participate in both high-cost and Lifeline programs. The other five are Lifeline-only ETCS. All five are wireless and were certified in 2009 or later. Nine Lifeline-only wireless ETC petitions are pending. Only one is facilities-based.

Nebraska has approved five Lifeline-only ETC applications in the last year and has three applications pending.

The data from theses States does show that Lifeline-only ETC applications are on the rise. I believe these anecdotal examples are representative of national trends, but USAC should be able to provide more definitive data and a more comprehensive analysis.

II. The Honorable Ben Ray Lujan

[A] As a former New Mexico Public Regulation Commissioner, I have a great deal of respect for your organization's work and am interested in your opinion on the Lifeline program and its recent reform proposals. Do you see any barriers to the effective engagement of State PUCs in overseeing Lifeline carriers? What can Congress or the FCC do to help ease those barriers?

Answer: The Universal Service Fund, including the low-income Lifeline program, is a shared responsibility of federal and State policymakers.

As outlined in my testimony, at least ten States and the District of Columbia do not designate wireless applications for ETC designation. In these States, the legislatures have not provided the commissions with the needed authority. For those states, wireless carriers must seek their approval from the FCC. But federal barriers do exist.

For example, in 1992, Congress enacted 47 U.S.C. Section 332. That provision preempts – except in limited circumstances, State authority over cell phone company rates. Congress wisely reserved State authority over "other terms and conditions" of cell phone service. However, putative Lifeline-only providers have cited this clause as a basis to refuse State requests for more information about rates crucial to making sound decisions. During the evaluation of one wireless Lifeline ETC application, for example, my commission asked the carrier for cost and rate data. The carrier refused saying that information was "rate" related and therefore outside our authority. While we recognize the FCC has the ultimate authority to determine the level of federal Lifeline support, it is important for State commissions to vet these Lifeline ETC applications thoroughly and understand as well as we can its business model and costs. Without accurate and reliable data regulators at the State or federal level cannot make sound decisions.

For the States that lack authority to designate wireless ETCs, the result is one less "cop on the beat" to guard against waste, fraud and abuse. In those States, the enforcement burden shifts to the FCC. Meanwhile, as the result of the FCC's intransigence in classifying the misleadingly[2] named "Voice over Internet Protocol" service has resulted a spate of State legislatures limiting or eliminating State Commission authority over such services. As the PSTN migrates to IP technologies and the federal Lifeline program properly transitions to support broadband, more of the responsibility for combating waste, fraud and abuse from such States is also likely to fall on the FCC. The question remains, does the FCC have the ability and resources to properly oversee the program in such States? History suggests the answer to that question is no.

FCC inaction on crucial issues has a definite impact. For example, as mentioned earlier, Section 332 reserves State authority over "other terms of conditions" of wireless service. However, the meaning of "other terms and conditions" has never been fully clarified leading, in some cases, to costly legal proceedings and reluctance in some States to provide oversight. This was highlighted in a 2009 GAO report which states that the "FCC has provided some guidance on this issue but has not fully resolved disagreement over states' authority to regulate billing line items and fees charged for terminating service early."[3] The FCC's failure to classify VoIP services is also a major impediment to State action which will only get worse as consumers transition to IP services. First, the FCC's inaction has given industry the opportunity to successfully mischaracterize the state of the law as a basis for persuading State legislatures to eliminate oversight authority. Second, the FCC's inaction has resulted in a host of State and FCC proceedings raising a range of issues that could be eliminated or significantly reduced if the agency classifies the service. The Telecommunications Act of 1996 utilizes a functional definition for "telecommunications service" that is technology neutral.[4] Determining the jurisdictional nature of VoIP will provide the clarity federal and State regulators need to perform their duties and provide industry with regulatory certainty. It will eliminate the need for additional (and costly) FCC and State proceedings on a wide range of issues. Where federal standards exist or are needed, there is no reason to – through inaction - effectively take State "cops" off the beat and reduce enforcement, or limit constituents' State remedies. The technology a carrier chooses to provide a service should never limit State (or federal) discretion to provide consumers with relief for fraudulent or abusive carrier practices or oversee crucial State and federal low income, high cost and broadband subsidy programs.

[B] At our hearing, Mr. Guttman-McCabe stated that CTIA will be challenging the Georgia Public Service Commission's decision to impose a $5.00 monthly service rate for all Lifeline subscribers. What do you think of the Georgia PSC's requirement and CTIA's subsequent legal challenge?

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2 "Misleading because the bulk of point-to-point managed subscription voice services (by companies like AT&T and Verizon) never touch the internet.

3 "FCC Needs to Improve Oversight of Wireless Phone Service", GAO Report Number: GAO-10-34, November 2009. Available at: http://www.gao.gov/products/GAO-10-34.

4 The Telecommunications Act of 1996 defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."(47 USC § 153).

Answer: Our federalist system of government allows States to act as laboratories for programs providing useful and tested templates to guide federal (and other State) policy makers' decisions. Lifeline is no exception. Just as the FCC provides States flexibility to go beyond the federal floor to establish State-based Lifeline eligibility criteria so too does it allow States to experiment with other modifications to the Lifeline program as long as they are consistent with federal goals. NARUC has not taken a position on the issue of imposing a minimum monthly charge and, personally, I have not formed an opinion either. The idea was debated by the Federal State Joint Board on Universal Service but ultimately was not included in the recommendation to the FCC. Logically, whatever the other impacts of such a fee, if imposed, it will necessarily inhibit "duplicate" service schemes[5] and it seems likely that the degree of inhibition will be linked to the surcharge level. However, it is not clear what the other impacts might be. There is no question that, given the growth in the program and the duplicate service issues, it is a policy worth examining. Of course, whatever happens in Georgia, creation of the national duplicates database will make duplicate ownership more difficult.

Recall historically the Lifeline program was a discount over residential retail service. Until recently, there was never an opportunity for free service – only an opportunity for discounted services. On the wireline side, customers also pay a minimum fee – their regular phone bill less the Lifeline discount. Even under the revised lifeline programs, the FCC has imposed some fees – requiring a $1 minimum monthly charge on its "Enhanced Lifeline for Tribal Lands" program.

Whatever happens in Georgia, it is clear that the United States can only benefit from such State experimentation with the Lifeline program.

5 Many of the recent FCC citations to individuals involved subscriptions to 9 – 12 phones. Obviously if a person is paying $5 per month per phone – there is a real cost associated with having more than one "free" prepaid phone. This is one reason why the problem of duplicate lifeline subsidies under the program prior to the advent of the prepaid wireless only ETCs was never a big problem. Eligible Lifeline subscribers for existing wireline and many wireless services only get a discount – not "free service" and still must pay a-not-insignificant monthly bill.